

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Adversary Proceeding
ROBERT STEVENS, d/b/a)	
TRUCK SERVICES OF SAVANNAH)	
(Chapter 7 Case <u>95-41828</u>))	Number <u>95-4158</u>
)	
<i>Debtor</i>)	
)	
)	
LORENZO CHISHOLM)	
)	
<i>Plaintiff</i>)	
)	
)	
)	
v.)	
)	
ROBERT STEVENS, d/b/a)	
TRUCK SERVICES OF SAVANNAH)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Plaintiff, Lorenzo Chisholm (hereinafter "Plaintiff"), objects to the discharge of his claim against Debtor, Robert Stevens (hereinafter "Debtor"). Plaintiff

asserts that he has obtained a judgment based on fraud and conversion against Debtor that is non-dischargeable under Sections 523(a)(2) and (6). Moreover, Plaintiff argues that Debtor is collaterally estopped from re-litigating issues of fraud and conversion previously decided in the state court proceeding. Debtor generally denies the allegation and further asserts that collateral estoppel principles do not apply to this judgment which in the nature of a default judgment. Plaintiff has moved for summary judgment regarding the issue of dischargeability. Plaintiff's motion arises in an adversary proceeding that he commenced against Debtor as a Complaint to Determine Dischargeability of Debt. As such, the matters involved herein constitute a core proceeding over which this Court has jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I). This Court has allowed the parties an opportunity to brief the issues and submit supporting documentation. After considering the evidence submitted, as well as the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On June 30, 1994, Plaintiff/Creditor, Lorenzo Chisholm, filed a complaint in state court against Debtor, Robert Stevens d/b/a Truck Services of Savannah, asserting claims of conversion, interference with contractual relations, fraud, and sought damages and attorney's fees in a case styled Lorenzo Chisholm v. Bobby Stevens d/b/a Truck Services of Savannah, Civil Action No. 94-1251-M, State Court of Chatham County, Georgia.

The incident giving rise to Plaintiff's claim is briefly summarized as follows. On June 4, 1994, Plaintiff, Lorenzo Chisholm, delivered Plaintiff's truck to Defendant's

place of business for repairs. After the repairs were completed, Plaintiff tendered to Defendant a check for \$263.12. Plaintiff then left Defendant's premises with the truck. On June 6, 1994, two days after the repairs were completed, Defendant made misrepresentations about the condition of the truck to Plaintiff's agent who redelivered the truck to Defendant's repair shop. Defendant then took possession of the truck and refused to release it, asserting a mechanics lien.

Plaintiff brought an action in State Court for fraud, conversion, and intentional interference with contractual relations. Plaintiff moved for partial summary judgment on all three counts; the State Court granted Plaintiff's motion for the counts of fraud and conversion, on the issue of liability only.

Specifically, the State Court found that Defendant made false representations, that at the time he knew they were false, that were made with the intention of deceiving the Plaintiff, that the Plaintiff reasonably relied on the representations, and sustained a loss as a proximate result of the misrepresentations. Accordingly, the State Court granted Plaintiff's motion for partial summary judgment on his claim of fraud. The State Court also determined that Debtor exercised dominion over the personal property of Plaintiff through an unauthorized appropriation of the property. Thus, the State Court also granted Plaintiff's motion for summary judgment on his conversion claim. A hearing to determine damages, including punitive damages, arising from the intentional torts of conversion and fraud was scheduled for September 16, 1995. However, Defendant/Debtor

Bobby Stevens filed for Chapter 7 bankruptcy on September 11, 1995.

Plaintiff contends that because the trial judge made specific findings of fact regarding the claim of fraud Debtor is estopped from re-litigating the issue and the debt is excepted from discharge pursuant to Section 523(a)(2). Plaintiff notes that the State Court Order determined that (1) Debtor made a false statement to Plaintiff's agent knowing it was false at the time it was made; (2) Plaintiff reasonably relied on the statement; (3) the reliance was justifiable; and (4) Plaintiff suffered damages as a result of Debtor's actions. Plaintiff also asserts that because the trial judge found that Debtor without authorization exercised dominion over Plaintiff's property the claim of conversion should also be excepted from discharge pursuant to Section 523(a)(6). In sum, Plaintiff contends that as a matter of law the claims of fraud and conversion are excepted from discharge and that Debtor is collaterally estopped from re-litigating the issue.

In response, Debtor contends that the state court judgment is in the "nature of default" and that traditional principles of collateral estoppel are unapplicable. According to Debtor, during the State Court proceedings, Debtor's prior counsel failed to respond to Plaintiff's Requests for Admissions in a timely manner.¹ Pursuant to O.C.G.A. Section 9-11-36, the requests were deemed admitted. Debtor contends that his prior counsel acted without his knowledge or consent and that given the opportunity he, Debtor, would have

¹ Debtor openly acknowledges that prior counsel failed to respond to Plaintiff's Requests for Admissions. See Defendant's Brief in Opposition to Motion for Summary Judgment, p.2 ("Defendant failed to respond to Requests for Admissions, which, under Georgia law, are deemed admitted").

denied any request requiring him to admit that he acted with malice, fraud, or a conscious indifference or that he wrongfully took possession of the truck.

CONCLUSIONS OF LAW

In accordance with Federal Rule of Civil Procedure (applicable to bankruptcy under Fed.R.Bankr.P. 7056), this Court will grant summary judgment only if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of establishing its right to summary judgment, See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir.1991); See Clark v. Union Mut. Life Ins. Co., 692 F.2d 1370, 1372 (11th Cir.1982), and the court will read the opposing party's pleadings liberally. See Anderson, 477 U.S. at 249, 106 S.Ct. at 2510-11.

In determining whether there is a genuine issue of material fact, the Court must view the evidence in the light most favorable to the party opposing the motion. See Addickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); See Rosen v. Biscayne Yacht and Country Club, Inc., 766 F.2d 482, 484 (11 Cir.1985). Once a motion is supported by a *prima facie* showing that the moving party is entitled to judgment as a matter of law, the party opposing the motion must go beyond the

pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. See Martin v. Commercial Union Ins. Co., 935 F.2d 235, 238 (11th Cir.1991).

This Court will first decide whether collateral estoppel precludes the discharge of Debtor's judgment against him. Essentially, collateral estoppel, or issue preclusion, bars re-litigation of issues previously decided in a judicial or administrative proceeding if the party against whom the prior decision is asserted had a "full and fair opportunity" to litigate the issue in an earlier case. See Allen v. McCurry, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980); United States v. Irvin, 787 F.2d 1506, 1515 (11th Cir.1986); Sorrells Constr. Co. v. Chandler Armentrout & Roebuck, P.C., 214 Ga.App. 193, 193-94, 447 S.E.2d 101 (1994). The purpose of this doctrine is to prevent parties from re-litigating previously decided issues, promote judicial economy, and ensure finality of rendered judgments.

In the present case, Plaintiff, Lorenzo Chisholm, brought the instant adversary proceeding claiming that the judgment of the State Court is excepted from discharge pursuant to 11 U.S.C. Sections 523(a)(2) and (6). Section 523 provides in pertinent part as follows:

(a) A discharge under section 727, 1141, 1228[a], 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(2) for money, property, services, or an extension,

renewal, or refinancing or credit to the extent obtained,
by--

(A) false pretenses, a false representation, or actual fraud,
other than a statement respecting the debtor's or an
insider's financial condition;

(6) for willful and malicious injury by the debtor
to another entity or to the property of another entity;

11 U.S.C. §§ 523(a)(2) and (6) (1994). In Section 523(a) dischargeability actions, courts recognize the applicability of collateral estoppel. *See Grogan v. Garner*, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n.11 112 L.Ed.2d 755 (1991); *Meyer v. Rigdon*, 36 F.3d 1375, 1378 (7th Cir.1994); *In re Davis*, 3 F.3d 113, 114 (5th Cir. 1993); *In re Yanks*, 931 F.2d 42, 43 n. 1 (11th Cir.1991). Moreover, according to federal law, if a state court has rendered a prior judgment, then the federal court must apply the collateral estoppel law of that state to determine the judgment's preclusive effect. *See In re St. Laurent*, 991 F.2d 672, 675-76 (11th Cir.1993). Therefore, this Court must apply the law of the State of Georgia in order to determine the preclusive effect of the judgment against Debtor in state court.

Georgia statutory law recognizes the preclusive effect of judgments by
providing as follows:

A judgment of a court of competent jurisdiction
shall be conclusive between the same parties and their
privies as to all matters put in issue or which under the

rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.

O.C.G.A. § 9-12-40. According to Georgia law, for a party to assert the doctrine of collateral estoppel the issue must have been (1) raised in the prior proceeding, (2) actually and fully litigated, (3) decided by a court of competent jurisdiction, and (4) necessary to the final judgment. *See Boozer v. Higdon*, 252 Ga. 276, 278 313 S.E.2d 100, 102 (1984). The issue in contention is whether the Defendant was afforded an opportunity to "actually and fully litigate" the claims of fraud and conversion.

In support of his position, Debtor contends that the factual issues have not been actually litigated. Debtor relies on *Jamison v. Maner*, Chap. 7 No. 90-20400, Adv. Proc. 90-2021, Dec. 21, 1990, slip op. (Davis, J.), for the proposition that collateral estoppel principles do not apply when the judgment is in the nature of default. In *Maner*, a creditor obtained a judgment as a result of a debtor's failure to respond to a Statement of Principal Facts. This Court found that from the record provided it was unclear whether the Alabama District Court treated the facts presented by the Plaintiff to be admitted as alleged or went further to review the entire record and make specific findings of fact and conclusions of law. As a result, this Court, finding that the judgment was in the nature of default, denied the motion for summary judgment unless the plaintiff could supplement the record to prove that the issue had been "actually litigated."

Although the Maner case and the present one have many similarities, I hold that Plaintiff has met its burden of proving that the claims of fraud and conversion were actually and fully litigated. In the present case, the trial judge made extensive findings of fact and conclusions of law carefully examining each element of Plaintiff's claims. In Maner, it was unclear whether the trial judge examined the entire record or simply entered judgment in the nature of default for that debtor's failure to comply with local rules. Further, in the present matter, Defendant/Debtor participated in the state court proceedings subsequent to the State Court's ruling on admission of the factual requests.

In addition, the Eleventh Circuit Court of Appeals recently decided that the issue of a debtor's fraud was "actually litigated," for purposes of collateral estoppel, in a prior federal court action, even though judgment was entered on default, where debtor actively participated in adversary process for almost one year, was represented by counsel, answered complaint, filed counterclaim, filed discovery request, and, after undertaking to represent himself began to refuse to cooperate in discovery, and default judgment was entered as sanction for his refusal to participate in discovery. See In re Bush, 62 F.3d 1319 (11th Cir.1995). The Circuit Court found that "where a party has substantially participated in an action in which he had a full and fair opportunity to defend on the merits," a court may apply the doctrine of collateral estoppel to prevent further re-litigation of issues resolved by default judgment in the prior action. Id. at 1325. Here, the Defendant/Debtor had a full and fair opportunity and substantially participated in the state court proceeding notwithstanding counsel's failure to file a timely response. I believe that

it would be an abuse of the judicial process to permit Debtor to re-litigate the issues of fraud and conversion.

Upon review of the evidence submitted, I hold that the doctrine of collateral estoppel is applicable to Plaintiff's claims of fraud and conversion. In regard to the claim of fraud, the trial judge made specific findings of fact that included a determination that Debtor/Defendant "has admitted that the statement made to Plaintiff's driver was false, and that at the time it was made, Defendant knew it was false." (Plaintiff's Ex. "E" at 4-5). Clearly, the trial judge found "actual fraud" which is excepted from discharge pursuant to Section 523(a)(2). In regard to the issue of conversion, the trial judge found that "Defendant exercised dominion over the personal property of Plaintiff by an unauthorized appropriation of the property." (Plaintiff's Ex. "E" at 3). A debt arising from the unlawful conversion of the property of another is not expressly specified as nondischargeable in Section 523(a) because the language "willful and malicious injury" of Section 523(a)(6) covers a "willful and malicious conversion." *See* 124 Cong. Rec. H11,095-6 (daily ed. Sept. 28, 1978); S17,412-13 (daily ed. Oct. 6, 1978); construed in *Collier on Bankruptcy* ¶ 523.16 at 523-137. In the present case, the trial court found that Debtor/Defendant committed the intentional tort of conversion under Georgia law and pursuant to Section 523(a)(6) the judgment shall be excepted from discharge.

ORDER

1) Pursuant to the foregoing Findings of Fact and Conclusions of Law,
IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment by
Lorenzo Chisholm is GRANTED.

2) A debt is the amount of the judgment to be subsequently determined
in the case styled Lorenzo Chisholm v. Bobby Stevens d/b/a Truck Services of Savannah,
Civil Action No. 94-1251-M, State Court of Chatham County, Georgia, is excepted from
discharge pursuant to Sections 523(a)(2) and (6).

3) Pursuant to Section 1334(c)(1), this Court presently abstains from
determining the issue of damages.² Plaintiff is granted relief from stay for the sole purpose
of continuing its State Court action to determine the appropriate amount of damages
arising from the judgment.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of May, 1996.

² "Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1334(c)(1).